Recent Developments in the Treatment of Collusion by Korean Courts

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Abstract

The purpose of this article is to provide an analytical introduction to recent developments in Korean competition law through the prism of court precedents dealing with collusion. Under the Korean regulation system, the investigation and sanctioning of collusion is the responsibility of the Korea Fair Trade Commission (the "KFTC"). Prior to 1994, Korean enterprises rarely appealed decisions of the KFTC to the competent court, with the result that Korean courts were unable to develop substantial expertise in the field of competition law. Since that time, however, the number of appeals has increased. As court precedents have accumulated, judges have gradually improved their understanding of the Monopoly Regulation and Fair Trade Act (the "MRFTA").

However, judges have repeatedly demonstrated an unwillingness to articulate specific rules to be referenced in similar instances, preferring to restrict themselves to deciding the case at hand. Yet notwithstanding this mixed record, a more promising trend is evident in recent decisions dealing with collusion. In such decisions, the Supreme Court has begun to articulate specific rules to be applied in similar cases. Moreover, some courts have recently attempted to utilize economic analysis more broadly in their review of cases under the MRFTA. If such efforts are expanded, they could herald an era of unprecedented growth and development of competition law in Korea.

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I. Introduction

The Monopoly Regulation and Fair Trade Act (the "MRFTA"), the competition law of Korea, was enacted in 1980. Since its enactment, the MRFTA has prohibited unreasonable collaborative practices by enterprises. However, in spite of this prohibition, collusion has continually occurred. Plausible explanations for this persistence of collusion include the traditional Korean emphasis on cooperation over competition,[1] as well as the direct role of government in the development of the Korean economy. Yet, for whatever reason, the fact is that Korean enterprises are still relatively inexperienced in the practice of free and fair market competition.[2] As a result, the investigation and sanctioning of collusion remain important components of the work of the Korea Fair Trade Commission (the "KFTC").

In general, Korean competition law resembles that of the European Union rather than that of the United States. The KFTC is the government agency responsible for regulating practices that violate the MRFTA. When the KFTC finds such practices, it usually orders corrective measures. If it is appropriate, it also imposes administrative fines on the violating company in addition to the corrective order. In collusion cases, the KFTC has usually imposed administrative fines. Decisions of the KFTC may be appealed to the Seoul High Court, which is an appellate court. Prior to 1994, enterprises had rarely appealed corrective orders of the KFTC to the competent court. Since that time, however, such challenges have gradually increased. The accumulation of court precedents has yielded significant developments for competition law.

The purpose of this article is to provide an analytical introduction to recent developments in Korean competition law through the prism of court precedents dealing with collusion. Section II begins with an overview of the basic system for restricting collusion in Korea, with emphasis on key provisions of the MRFTA. Leading court precedents pertaining to collusion are discussed in Section III, which is followed by a brief conclusion.

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1) Ohseung Kwon, "Why Should We Compete", 9 *Competition Law Stud*. (Apr. 2003), p 4.

2) *Id*. at 5.

II. Overview of Laws Regulating Collusion

A. Prohibition of Unreasonable Collaborative Practices

Article 19 of the MRFTA ("Article 19") is comparable to Article 81 of the Treaty establishing the European Community (the "Treaty") and Section 1 of the Sherman Act in the U.S. Article 19(1) prohibits contract, agreement, resolution or any other means by and among enterprises, that unreasonably restricts competition, to engage in concerted practices (i) fixing, maintaining or changing price, (ii) determining terms and conditions of trade, (iii) restricting production, delivery, transportation or trade, (iv) restricting territory or customers, (v) restricting the establishment or extension of facilities, (vi) restricting types or specification for the production or trade of goods, (vii) establishing a company, etc., to jointly carry out or manage material parts of a business, or (viii) that substantially suppresses competition in a market by means of interfering with or restricting other person's business. Article 19(1) provides a listing of types of activities that can be prohibited as unreasonable collaborative practices.

Article 19 prohibits the mere agreement to engage in unreasonable collaborative practices. Performance of the agreement is not required. Thus, where a "meeting of minds" to form a cartel is established, Article 19 is violated and remedies are available whether or not the agreement is actually performed.[3] Moreover, either an express or an implied "meeting of minds" is sufficient to establish a violation of the statute.[4]

Under the MRFTA, the KFTC must prove the "illegality" of a given practice. Unlike mergers and acquisitions cases, however, strict scrutiny to prove illegality is not necessary for collusion cases, especially cases involving hard-core cartels, which typically threaten the core of competition by restricting price, quantity, territory or customers.[5] Although the distinction under U.S. antitrust law between the "*per se*" rule and the "rule of reason" is not directly applicable to the MRFTA, such

3) The Supreme Court has endorsed this rule. *See* Supreme Court Decision, February 23, 1999 (98 du 15849), ; Supreme Court Decision, May 8, 2001 (2000 du 7872).

4) *See* Ohseung Kwon, *Economic Law*, 4th ed., (Seoul: Beopmunsa, 2002), p 274.

5) *Id*. at 281-282.

distinction has relevance to the application of the MRFTA in practice. For example, the KFTC and the courts have been quick to recognize the "illegality" of hard-core cartels in cases involving price fixing, bid rigging and market allocation, to which the *per se* rule would be applicable under U.S. antitrust laws, without full analysis of the effects on the relevant market. By contrast, in cases other than hard-core cartels, the KFTC and the courts are required to apply an analysis resembling the rule of reason, in which pro-competitive benefits are considered together with anticompetitive harms in determining the illegality of the cartel.

Many scholars have argued that Article 19, like its U.S. and EU counterparts, may be applicable to vertical as well as horizontal restraints. However, the KFTC has, in practice, dealt with vertical restraints by means of Article 23 of the MRFTA[6], which provides a listing of vertical restraints including unilateral refusal to deal, territorial and customer restraints, exclusive dealerships, exclusive dealing and tying arrangements. For resale price maintenance, Article 29 of the MRFTA governs. Thus, in practice, Article 19 has been applied only to horizontal restraints. Accordingly, the discussion that follows will be similarly confined to cases involving horizontal restraints.

Cartels to satisfy certain exceptional requirements may be allowed by permission of the KFTC under Article 19(2). However, in practice such permission has very rarely been granted.[7] Article 19(4) provides that any agreement to engage in collusion as defined in Article 19(1) shall be null and void, without binding effect on the parties thereto.[8] Consequently, a party to any such agreement may argue that the agreement is invalid at any time.

A collusive agreement may be presumed upon satisfaction of the requirements set forth in Article 19(5). According to the stipulation, "where two or more enterprises commit any practice listed in Article 19(1) that substantially restricts competition in a particular business area, they shall be presumed to have committed an unreasonable collaborative practice despite the absence of an express agreement

6) Article 23 of the MRFTA was designed to restrict unfair trade practices, including vertical restraints.

7) To date there have been only 7 permissions granted, none of which is valid at present. Sun Hur, "The Outcome and Assignment of the Fair Trade Commission with respect to Cartel Restriction", in Ohseung Kwon ed., *Fair Trade and Control of Law*, (Seoul: Beopmunsa, 2004), p 517.

8) *See* Supreme Court Decision, July 7, 1987 (86 daka 706).

to engage in such practice." Under the statute, the phrase "a particular business area" means a relevant market.[9] This provision is unique to the MRFTA. The purpose of this stipulation is to reduce the KFTC's burden of proof in response to the difficulty of finding direct proof of collusion such as a written agreement. Due to the ambiguous languge of this provision, various interpretations have been advanced by scholars. However, the Supreme Court has consistently followed its own highly controversial interpretation of Article 19(5) since 2002.[10]

Unreasonable collaborative practices enforced by a trade association are also prohibited by Article 26 of the MRFTA. It is not difficult in Korea to find trade associations composed of competitors in a relevant market. The main purpose of such associations is to pursue the common interests of competitors in the same industry. However, sometimes the associations compel or facilitate collusion among competitors. To restrict such behavior, Article 26 of the MRFTA is applied.

B. Remedies

Where a violation of Article 19 is established, the KFTC typically issues an order requiring the relevant enterprise to discontinue the prohibited practice. In addition, the KFTC is authorized to take other appropriate corrective measures.[11] Moreover, the KFTC may impose administrative fines not exceeding five percent of the average turnover of the enterprise to be penalized during the recent three fiscal years.[12] The five percent ceiling was increased to ten percent under a recent amendment to the MRFTA, which will be effective from April 1, 2005. In practice, the KFTC has usually punished collusion by imposing administrative fines in addition to corrective measures. Article 22-2 provides a leniency program, which allows some benefits to an enterprise which reports collusion to the KFTC or which cooperates with a KFTC investigation.

Further, an employee or an officer violating Article 19(1) may be punished by imprisonment not exceeding three years or by criminal fines up to two hundred

9) Article 2 (viii) of the MRFTA.

10) Details are discussed in Section III.B.

11) Article 21 of the MRFTA.

12) Article 22 of the MRFTA and Article 9 of the Enforcement Decree of the MRFTA.

million Korean Won.[13] The enterprise may be punished with criminal fines up to two hundred million Korean Won.[14] However, violations of Article 19(1) cannot be prosecuted unless the KFTC files a complaint with the prosecutor's office.[15] In practice, the KFTC has been reluctant to file such complaints except in the case of serious - e.g., collusion maintained by means of threats or force - or repeated violations.

Any person who is injured by an act of collusion may bring a civil action against an enterprise participating the collusion to claim compensation for damages. However, civil actions based on injuries by collusion have rarely been brought. One of the reasons is that only actual damages can be compensated. The Korean legal system does not support recovery of treble damages or punitive damages. Another reason for the scarcity of civil damage claims is that class actions are not permitted for violations of the MRFTA.[16]

C. Procedural Stipulations

The KFTC may conduct necessary investigations upon suspicion that a violation of the MRFTA has occurred or in response to a report filed with the KFTC by a person alleging that such a violation has occurred.[17] If the KFTC finds a violation through its investigation, the KFTC will conduct a hearing to be attended by the parties concerned.[18] After the hearing, the KFTC determines a corrective order, imposition of an administrative fine and/or the filing of a complaint with the prosecutor's office.[19] The sanctioned enterprise may request that the KFTC

13) Article 66(1)(ix) of the MRFTA.

14) Article 70 of the MRFTA.

15) Article 71(1) of the MRFTA.

16) Under Korean laws, class actions are allowed only for certain actions arising under the Securities and Exchange Act.

17) Article 49 of the MRFTA.

18) Article 52 of the MRFTA.

19) If the violation is minor, the KFTC may recommend a corrective plan to the violating enterprise without a hearing. If the enterprise accepts such recommendation, the process is over. If not, a hearing is held pursuant to the standard procedure. *See* Article 51 of the MRFTA.

reconsider the case.[20] Although the KFTC very rarely overturns its previous decision in such cases, it has sometimes modified a corrective order or reduced an administrative fine where circumstances have merited such action.

The determination of the KFTC can be appealed to the Seoul High Court, which has exclusive jurisdiction over such appeals.[21] In appellate cases, the violating enterprise becomes the plaintiff and the KFTC becomes the defendant. A party contesting a judgment of the Seoul High Court may appeal to the Supreme Court. The judgment of the Supreme Court is final. Thus, judgments of the Supreme Court are of paramount importance in the interpretation of the relevant provisions of the MRFTA as well as in the continued development of competition law.

III. Review of Court Precedents

A. Meeting of Minds

As discussed above in Section II.A, the Supreme Court has repeatedly confirmed that an agreement for unreasonable collaborative practices is sufficient to establish a violation of Article 19. Performance of the agreement is not required. Further, where an enterprise argued that it had agreed to a bid rigging arrangement with other enterprises not actually intending to observe such agreement, and then bid a price lower than the agreed price, the Supreme Court held that such agreement also violated Article 19 since other enterprises had relied on the agreement and that the enterprise in question had manipulated the bidding process by participating with the agreement.[22]

B. Presumption of an Agreement

Article 19(5) stipulates "where two or more enterprises commit any practice listed in Article 19(1) that substantially restricts competition in a particular business

20) Article 53 of the MRFTA.

21) Articles 54 and 55 of the MRFTA.

22) Supreme Court Decision, February 23, 1999 (98 du 15849).

area, they shall be presumed to have committed an unreasonable collaborative practice despite the absence of an express agreement to engage in such practice." This provision was enacted to assure that secret collusion would be forcefully prohibited.[23] The plain language of the provision extends the presumption to the existence of the unreasonable collaborative practice itself. Nevertheless, the provision has subsequently been interpreted so as to presume only the existence of an agreement, while eliminating the presumption of unreasonableness of the corresponding collusion.[24] Such interpretation has also been embraced by the Supreme Court.[25]

Before the Supreme Court settled the issue in the series of decisions, various alternative interpretations of Article 19(5) had been asserted by scholars and commentators. One persuasive interpretation was that an agreement should be presumed where apparent consistency of practices and so-called "plus factors"[26], similar to those found in U.S. antitrust law, were discovered.[27] In practice, this was the interpretation followed by the KFTC in applying Article 19(5). However, this explanation was criticized as inconsistent with the language of Article 19(5). Another influential assertion stated that an agreement should be presumed in cases where the existence of the agreement remained uncertain even after the KFTC had investigated in good faith.[28] This interpretation was influenced by the "administrative presumption theory" of German competition law.[29]

However, the Supreme Court rejected both of these interpretations in holding that an agreement among enterprises will be presumed where the KFTC proves (i) that two or more enterprises have committed any practice listed in Article 19(1)

23) Supreme Court Decision, March 15, 2002 (99 du 6514, 6521); Supreme Court Decision, October 28, 2004 (2002 du 7456).

24) Ohseung Kwon, *supra* n. 4, at 275; Meong Cho Yang, "The Standard to Assess 'Unreasonableness' for Unreasonable Collaborative Practices", in Ohseung Kwon ed., *Lecture of the Fair Trade Act*, (Seoul, Beopmunsa, 1996), p 268.

25) Supreme Court Decision, March 15, 2002 (99 du 6514, 6521); Supreme Court Decision, May 28, 2002 (2000 du 1386).

26) For explanation of plus factors, *see* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, 2d ed (Aspen Law & Business, 2003), vol. VI §§ 1434-1435.

27) Meong Cho Yang, *supra* n. 24, at 269-270.

28) Ohseung Kwon, *supra* n. 4, at 276-277.

29) *Id*.

("apparent consistency of practice"), and (ii) that such practice substantially restricted competition in a particular business area ("substantial restriction on competition").[30] In addition, the Supreme Court stated that the KFTC was not required to prove so-called "plus factors".[31] The leading case in this line involved price increases implemented by two instant coffee companies.[32] Between them, the two companies shared nearly the entire instant coffee market. Each company raised its price once because consumers preferred more expensive "premium" coffee over lower priced alternatives. As the price was raised, market share expanded. Finally the two companies set the same prices for their respective products. The Supreme Court held that the requirement of "substantial restriction on competition" should be determined *without assumption of an agreement*[33] by considering whether the practice in question would affect or threaten to affect the determination of price, quantity, quality or other terms and conditions of trade in accordance with the intent of a certain enterprise or a trade association due to reduced competition in a particular business area, taking into account such factors as the characteristics of the goods, consumer preferences, and the effects of the practice on the relevant market or competitors. Applying its analysis to the instant coffee case, the Supreme Court decided that the "substantial restriction on competition" test was not met for the reason that competition between the coffee companies had occurred under unusual circumstances in which consumers actually preferred more expensive goods. Among other effects, the decisions rendered in the instant coffee case and its progeny have caused the KFTC to undertake not only "plus factors" analysis but also "substantial restriction on competition" analysis.

The approach taken by the Supreme Court in the instant coffee case has been criticized as an interpretation that is obedient to the letter of Article 19(5) while disregarding the spirit of the provision. First, the Court's approach was criticized in that the "substantial restriction on competition" was not itself a fact to be proved by

30) Supreme Court Decision, March 15, 2002 (99 du 6514, 6521); Supreme Court Decision, May 28, 2002 (2000 du 1386); Supreme Court Decision, February 28, 2003 (2001 du 1239); Supreme Court Decision, May 27, 2003 (2002 du 4648); Supreme Court Decision, December 12, 2003 (2001 du 5552).

31) *Id*.

32) Supreme Court Decision, March 15, 2002 (99 du 6514, 6521).

33) Author's emphasis.

the KFTC, but only a result of an assessment based on other given facts.[34] In other words, the court by itself had to appraise whether the practice substantially restricted competition in a relevant market on the basis of facts proved by the parties. Second and more importantly, the rule that substantial restriction on competition should be appraised "without assumption of an agreement" was criticized in that illegality of collusion comes from an "agreement." In the case of collusion, illegality is admitted for the reason that enterprises make an agreement not to compete by means of price, quality, quantity or other terms and conditions of trading.[35] Thus, the requirement of substantial restriction on competition should be reviewed under the assumption that an agreement exists among the enterprises in question.[36] In other cases, courts acknowledged substantial restriction on competition from the facts that (i) oligopolistic enterprises increased prices uniformly or similarly at the same or similar time, (ii) the sums of market shares held by the enterprises were high, and (iii) goods were homogeneous.[37] In another case, the Supreme Court recognized a substantial restriction on competition from overcapacity in the relevant market in addition to the above three factors.[38] However, the three factors cited above cannot, by themselves, constitute grounds for inferring the existence of a substantial restriction on competition in the absence of an agreement among the relevant enterprises. Indeed, in a fully competitive market, the same phenomena would be expected to occur as a result of an increase in the prices of commonly utilized raw materials. In order for the Supreme Court to conduct its "substantial restraint on competition" assessment without assuming any agreement, it should utilize economic analysis as suggested by Judge Posner.[39] However, if full economic

34) Bong-Eui Lee, The Presumption of an Agreement for Unreasonable Collaborative Practices, 380 *Jurist* (May. 2002), p 77.

35) *See* Ohseung Kwon, *supra* n. 4, at 281-282.

36) Meong Cho Yang, "Court Precedents regarding Unreasonable Collaborative Practices, in Free Competition and Fair Trade", in Ohseung Kwon ed., (Seoul: Beopmunsa, 2002), p 218.

37) Supreme Court Decision, December 12, 2003 (2001 du 5552); Seoul High Court Decision, March 20, 2003 (2002 nu 9041).

38) Supreme Court Decision, May 27, 2003 (2002 Du 4648). Although price increases implemented in spite of overcapacity may support an inference of substantial restriction on competition, they appear insufficient, by themselves, to support an evidentiary finding of substantial restriction on competition.

39) *See* Richard A. Posner, *Antitrust Law*, 2d ed., (The University of Chicago Press, 2001), p69-93. Judge

analysis were required as a condition of applying Article 19(5), it would be difficult to achieve another key purpose of the provision: reducing the KFTC's burden of proof.

In contrast to other legal presumption cases, the Supreme Court reduced the burden of proof of enterprises to rebut a presumption under Article 19(5). Where legal presumptions are made pursuant to other statutes, the party contesting the presumption must prove the absence of the presumed fact with convincing proof.[40] However, in the case of Article 19(5), the Supreme Court has held that enterprises can rebut a presumption by proving (i) the inexistence of an agreement among the relevant enterprises to engage in unreasonable collaborative practices, or (ii) circumstances implying that the apparent consistency of the practice would not be a result of an agreement among enterprises.[41] In applying this standard, it seems that the courts would regard the presumption to have been successfully rebutted if the probability of the practice occurring without such an agreement were proven.

The leading case accepting the rebuttal of a presumption under Article 19(5) involved the increase of prices by four companies in the tissue paper market.[42] After a leading company raised its price, the other companies followed. Such practices were subsequently repeated. The Supreme Court upheld that the presumption would be rebutted where a leading company raised its price and the other companies simply followed in an oligopolistic market unless the leading company anticipated that the other companies would match the price considering past experiences of price increase and market circumstances. Applying the aforementioned standard, the Supreme Court determined that the presumption as to the first price rise had been rebutted but that the presumption with respect to the second and subsequent price

Posner suggests an economic approach involving two stages instead of the traditional approach based on proof of a conspiracy. The first stage involves identifying those markets in which conditions are propitious for the emergence of collusion. The second stage involves determining whether there really is collusive pricing in any of those markets. *Id*. at 69.

40) Jae Sung Lee and Bong Soo Kang, *Commentary of Civil Procedure Act*, 5th ed., (Korea Judicial and Administrative Society, 1997), p179.

41) Supreme Court Decision, February 28, 2003 (2001 du 1239); Supreme Court Decision, May 27, 2003 (2002 du 4648); Supreme Court Decision, December 12, 2003 (2001 du 5552); Supreme Court Decision, October 28, 2004 (2002 du 7456).

42) Supreme Court Decision, May 28, 2002 (2000 du 1386).

rises had not been rebutted. Continued application of this rule may work to prohibit conscious parallelism following an initial price increase under the price leadership model and may require oligopolistic enterprises to set their prices unreasonably. It would be proper to determine the sufficiency of rebuttal evidence on the basis of whether independent business judgment or common factors affecting price existed instead of whether the leading company anticipated that other companies would match a price increase.[43]

In deciding whether the presumption of an agreement was rebutted, the Supreme Court considered characteristics of the relevant market, attributes of the goods, distribution system, system of price determination, factors affecting price, business justification, extent of communication among enterprises, probability of consistent practice without collusion, previous patterns of price-matching behaviors among competitors, history of violating the MRFTA, background of economic policy, etc.[44]

Recently the Supreme Court noted in dictum that there was no provision under Korean law for imposing criminal sanctions on a person for violating Article 19(5).[45] Previously, it had been unclear whether or not criminal sanctions could be imposed under Article 19(5).

C. Determination of Illegality

1. Price-Fixing, Price Maintenance, or Price Changes

With respect to a collusive practice to fix, maintain or change prices, the Supreme Court has usually recognized the illegality of the practice in question without detailed analysis of the relevant market or the anticompetitive effects thereon. Indeed, the Supreme Court has stated that "price means a consideration of goods or services provided by an enterprise .... [P]rice includes anything to be actually paid as consideration for goods or services regardless of the name of such payment."[46]

43) Meong Cho Yang, *supra* n. 36, at 222-223.

44) Supreme Court Decision, May 27, 2003 (2002 du 4648); Supreme Court Decision, December 12, 2003 (2001 du 5552).

45) Supreme Court Decision, October 28, 2004 (2002 du 7456).

46) Supreme Court Decision, May 8, 2001 (2000 du 7872).

Is it illegal price fixing if competitors agree on certain standard prices instead of real prices applied to their customers? In many Korean industries, including paper, tires and tissues, enterprises set certain standard prices and then determine the real price for each customer through an approach that involves discounting a certain percentage from the standard price based on the quantity of trade, payment method, customer's credit rating and other terms and conditions of the transaction. As a result of this complex and individualized approach, the actual price of each enterprise for each customer varies. The Supreme Court[47] and the Seoul High Court[48] have both held that the agreements on standard prices violated Article 19 in that the standard prices served as the basis for determining, and thus affected, actual prices.

In a case that a trade association had disseminated among its members certain price calculation standards, the Seoul High Court ruled that such dissemination was illegal due to its anticompetitive effect.[49] In the case, the Korea Construction Consulting Engineering Association determined the Standard of Consideration for Consulting Engineering Services (the "Standard") based upon its own articles of association, which had been approved by the Ministry of Construction and Transportation (the "MOCT"), and published such Standard in its own periodicals. The association argued that (i) the Standard had been utilized only for public construction and for the purpose of providing proper price information to government agencies, (ii) consulting engineering services for public construction was determined by bidding and the consulting engineering companies did not determine their bid price based on the Standard, (iii) the Standard had been established by prior consultation with the MOCT, the *de facto* representative of the potential clients, and (iv) the Standard was authorized by the articles of association approved by the MOCT. However, the court did not accept such argument. Without taking a position on the reasonableness of the price itself, the court ruled that the association had restricted competition by determining prices in order to maintain a certain price level. The Supreme Court affirmed the determination of the Seoul High Court.[50]

47) Supreme Court Decision, May 28, 2002 (2000 du 1386).
48) Seoul High Court Decision, October 2, 2003 (2002 nu 12757).
49) Seoul High Court Decision, November 19, 2002 (2002 nu 1313).
50) Supreme Court Decision, April 8, 2003 (2002 du 12779).

Can the reasonableness of a resulting price provide a defense to a charge of collusion? The Seoul High Court has answered this question in the negative, declaring that a cartel was illegal even where formed to maintain reasonable terms and conditions of trade among a customer and enterprises participating in the collusion, and even where the customer occupied a superior position vis-à-vis the enterprises.[51]

The Supreme Court, moreover, held that a delivered pricing and based-point pricing scheme was a violation of Article 19.[52] The fact pattern and the court decision in this case were similar to those of *FTC v. Cement Institute*, 333 U.S. 683 (1948). Specifically, enterprises producing steel sheets agreed to receive transportation costs consistent with those from the nearest factory of manufacturers to the delivery point regardless of actual transportation costs. The Supreme Court confirmed that an agreement regarding the transportation costs of steel sheets fell under the definition of price fixing under Article 19 in that a delivered price consists of a purchase price and a transportation cost. In the view of the court, the case presented a typical base-point pricing scheme.

2. Bid Rigging

The Supreme Court and the Seoul High Court have found illegal bid-rigging activities in a number of cases. It seems that the courts have had little trouble finding illegality in bid rigging cases. In the leading case, a group of construction companies was alleged to have rigged a bid on a government project.[53] Declaring that an agreement between two strong participants among various participants in the bid was illegal, the Supreme Court ruled that it was not necessary to review whether or not other participants joined in the agreement. Furthermore, the Supreme Court stated that an agreement is illegal if it restricts competition even though only parts of the participants or competitors in the relevant bid or market are actually involved in the agreement.[54]

51) Seoul High Court Decision, October 2, 2003 (2002 nu 12757).
52) Supreme Court Decision, May 8, 2001 (2000 du 7872).
53) Supreme Court Decision, February 23, 1999 (98 du 15849).
54) *Id*.

3. Preemption and Administrative Guidance

Article 58 of the MRFTA stipulates that the MRFTA shall not apply to practices duly conducted by an enterprise or a trade association in accordance with any other law or any order based on such law. Where any law, regulation or order grounded in a law expressly authorizes a practice that might restrict competition, the MRFTA is clearly preempted by such law, regulation or order. Preemption controversies usually arise from cases where either the practice is undertaken by enterprises in accordance with administrative guidance having no direct basis in law, or the practice has no direct basis in any law but is undertaken by a trade association regulated by a special law and/or supervised by a government agency. Administrative guidance is a general term referring to guidance, recommendations, advice, etc., communicated informally by an administrative agency in accordance with the administrative purposes of the agency.[55] Because it is generally understood that administrative guidance has no binding legal effect, enterprises do not necessarily observe such administrative guidance.[56] At a practical level, however, enterprises generally respect the administrative guidance. In the past, relevant laws endowed government agencies with broad power to regulate the private sector directly. However, a gradual trend toward deregulation has reduced the power of government agencies. In consequence, government agencies have widely employed administrative guidance as a useful means to perform its administrative policies. The problem is that administrative guidance sometimes induces or facilitates collusion among competitors in an industry.

The leading preemption case was a 1997 Supreme Court case involving an internal regulation of the Certified Judicial Scriveners' Association.[57] The internal regulation in question provided that certain important cases were to be assigned in an order determined by the association. The Supreme Court held that such internal regulation violated Article 26 of the MRFTA because the statute regulating the association, the Certified Judicial Scriveners' Act (the "CJSA") did not minimally

55) *See* Article 2 (iii) of the Administrative Procedures Act.

56) Bong-Eui Lee, "The Purpose of the Monopoly Regulation and Fair Trade Act and Illegality of Practices Restricting Competition", 1 *Stud. of Precedents for Competition Law* (Jul. 2004), p 20.

57) Supreme Court Decision, May 16, 1997 (96 nu 150).

require such practice (despite the fact that the CJSA did contain various ostensibly relevant clauses such as those prohibiting improper solicitation of cases or requiring adherence to the standard of prudent manager and observance of all internal regulations of the association).[58] In deciding the case, the Supreme Court recognized a somewhat narrowed scope of preemption in holding that Article 58 should be applied in a limited manner to practices minimally required under any law (or order grounded thereon) that concretely stipulates an exception to the principal of free competition where (i) it is reasonable to restrict competition due to the specialized nature of the business or (ii) it is necessary to give monopolistic position by government permission but to regulate the business by the government for public interest.

Before the Certified Judicial Scriveners Association case was decided, the Seoul High Court interpreted a practice of a trade association according to administrative guidance was not illegal.[59] In the case, the Agricultural & Marine Products Wholesale Market Corporation Association (the "AWA"), which was composed of agricultural & marine products wholesalers, had established a consignment fee of 6% of the sales amount of agricultural and marine products and applied to member and non-member wholesalers alike pursuant to the administrative guidance of the Ministry of Agriculture, Forestry & Fishery (the "MOAFF"). Although the Enforcement Regulations of the Act on Distribution and Price Stabilization of Agricultural and Fishery Products (the "ADPSAFP") provided the maximum rate of the consignment fee (6%), they did not authorize the MOAFF to involve itself directly in the AWA's determination of the actual consignment fee. The Seoul High Court held that the AWA's determination, by means of administrative guidance of the MOAFF, of the actual consignment fee was not illegal for the reason that (i) the MOAFF could indirectly engage in setting consignment fee under its supervisory power over the AWA, (ii) the administrative guidance of the MOAFF was made within the bounds of sound common sense, and (iii) the administrative guidance was not contradictory to the ultimate goals of the MRFTA: protection of consumers and promotion of the balanced development of the national economy. This judgment has been criticized on the grounds that (i) the court allegedly relied on vague concepts

58) In Korea, certified judicial scriveners are permitted to provide certain limited legal services under the CJSA.

59) Seoul High Court Decision, December 6, 1996 (96 na 2240).

provided in the purpose clause of the MRFTA, (ii) the court's approach contradicted Article 19(2) of the MRFTA, which expressly provided exceptions of unreasonable collaborative practices, as well as Articles 58 to 60 of the MRFTA, which clearly stipulated practices exempt from regulation under the MRFTA, and (iii) enterprises are not required to observe administrative guidance.[60]

However, a recent Seoul High Court case[61] directly contradicted the above Seoul High Court judgment. This case was also related to the consignment and other fees of the AWA. In this case, the Seoul High Court did not recognize the existence of administrative guidance. Further, the Seoul High Court, citing the Certified Judicial Scriveners Association case, stated that the collaborative setting of consignment and other fees would violate Article 19 even under administrative guidance for the reason that administrative guidance was not expressly authorized by the ADPSAFP and could not therefore be considered an "order" under Article 58 of the MRFTA. This judgment is generally consistent with that rendered in the Korea Construction Consulting Engineering Association case discussed above, in which the Seoul High Court held that the establishment of the Standard according to its articles of association could not be deemed as a practice duly conducted on the basis of any other law or any order even though the MOCT had approved the articles of association.[62]

Recently, the Supreme Court presented a somewhat different view from the Certified Judicial Scriveners Association case in a collusion case involving beer companies that increased their respective prices at the same rate in accordance with administrative guidance from the Ministry of Finance and Economy (the "MOFE") and the National Tax Service (the "NTS").[63] The Supreme Court held that no collusive agreement could be presumed for the following reasons: (i) although prior consultation or admission is not necessary under the relevant laws for beer companies to increase beer prices, the MOFE and the NTS had engaged in price increases of beer companies by means of administrative guidance, (ii) the MOFE and the NTS allowed beer companies to increase beer price at a rate less than the

60) Bong-Eui Lee, *supra* n. 56, at 9-22.

61) Seoul High Court Decision, May 12, 2004 (2003 nu 5817).

62) Seoul High Court Decision, November 19, 2002 (2002 nu 1313); *see* Section 1 above.

63) Supreme Court Decision, February 28, 2003 (2001 du 1239).

rate requested by beer companies, which meant that beer companies had to increase prices at the same rate allowed by the MOFE and the NTS, (iii) after the NTS had negotiated with a leading beer company on the rate of price increase, the NTS informed other beer companies of the result thereof, and (iv) apart from engaging in negotiations with the NTS and receiving administrative guidance from the MOFE and the NTS, the beer companies did not separately agree on the rate of price increase. In the beer company case, the Supreme Court took the position that collusion cannot be established where (i) enterprises observe the administrative guidance of a government agency even in the absence of a law providing a direct basis for the administrative guidance, and (ii) enterprises entered into no separate agreement aside from merely obeying the administrative guidance.

The status of the preemption issue regarding administrative guidance remains unclear. Because the Certified Judicial Scriveners Association case did not directly deal with practices under administrative guidance, there was no need for the Supreme Court to distinguish its subsequent decision in the beer company case. Following the beer company case, however, the Seoul High Court[64] cited the Certified Judicial Scriveners Association case in declaring that certain practices conducted under the auspices of administrative guidance were nevertheless illegal because they had not been expressly authorized by any relevant law. The beer company case also assessed the practice under administrative guidance from a viewpoint of only whether an agreement could be presumed or not, whereas the Seoul High Court case evaluated the illegality of the practice under administrative guidance. Thus, it will in the future be necessary for the Supreme Court to establish clear rules with respect to collaborative practices of enterprises conducted in accordance with administrative guidance.

4. Establishment of a Joint Venture

Establishment of a joint venture typically results in pro-competitive benefits as well as anticompetitive harms.[65] However, the Seoul High Court held that the

64) Seoul High Court Decision, May 12, 2004 (2003 nu 5817), as shown above.

65) Bong-Eui Lee, "Contemplation of Joint Venture in View of Competition Law", 7 *Competition Law Stud.* (Apr. 2001), p 77.

establishment of a joint venture to distribute music discs produced by plaintiffs violated Article 19 without conducting a proper analysis of potential pro-competitive benefits in the fact that the market shares of the plaintiffs measured 53.9% collectively and the amount of music discs distributed through the joint venture was 36.6% of total turnover in the domestic market.[66] Although the plaintiffs argued that the purpose of the joint venture was to achieve greater efficiency in the distribution of music discs, the court understood the plaintiffs' assertion as an argument of lack of intention. Thus, the court simply denied the argument for the reason that the plaintiffs' main purpose was to exploit profits from the distribution market. Nevertheless, the court should have fully scrutinized potential pro-competitive effects and compared them with anticompetitive harms arising out of the establishment of the joint venture.

5. Economic/Political Boycotts

In a pair of recent decisions, the Supreme Court held the practice of trade associations making their members close their businesses to influence the passage of laws to be illegal.[67] The more recent of the two cases was related to the government policy for the separation of dispensary from medical practice.[68] The Korean Medical Association, which opposed the policy, attempted to influence the associated legislative process by requiring its members to close their offices. The majority opinion of the court was that such practice violated Article 26 of the MRFTA since it caused restrictions on free and fair competition among doctors. The majority approach contrasts with that followed by the U.S. Supreme Court in *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982) and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S.411 (1990), which allowed immunity from antitrust liability against petition to the government based on First Amendment rights unless the immediate purpose of the boycott was to further economic interests. Interestingly, the dissenting opinion in the Korean Medical Association case embraced the U.S.

66) Seoul High Court Decision, June 3, 2003 (2002 nu 13903).

67) Supreme Court Decision, May 12, 1995 (94 nu 13794); Supreme Court Decision, February 20, 2003 (2001 du 5347).

68) Supreme Court Decision, February 20, 2003 (2001 du 5347).

view in stating that such practice did not violate the MRFTA in that the main purpose of the practice was protesting government policy, not gaining profits from the restriction of competition.

D. Extraterritorial Application

In a case involving an international cartel of graphite electrode producers, the Seoul High Court stated that extraterritorial jurisdiction was acknowledged under the MRFTA where a practice in a foreign country was found to have a direct effect on the Korean market.[69] This judgment seems to have been influenced by *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

The extraterritorial application issue was resolved further by legislation. Article 2-2 of the recent amendment of the MRFTA expressly stipulates that the MRFTA shall apply to any activity occurring abroad where such activity has an effect on the domestic market. This approach is consistent with the above judgment.

E. Administrative Fine

Given the fact, as stated above, that an administrative fine of as much as 5% of sales can be imposed on an enterprise found to be in violation of the MRFTA, the propriety of the fine is frequently disputed in the courts. In this connection, the Supreme Court has stated that the basic character of the administrative fine is a means of administrative sanction, with the added dimension of a means of retrieving unjust profits.[70] The Supreme Court has also held that the KFTC has discretion over the issue of whether to impose an administrative fine on a violating enterprise and, if so, the appropriate amount of the fine.[71] Under this conception, the task of courts should be limited to reviewing whether the KFTC has abused its discretion in a given case. In cases in which the KFTC relied on mistaken facts in imposing an administrative fine, the courts have usually recognized an abuse of discretion.

In the past, the KFTC reserved the right to modify the amount of an administrative

69) Seoul High Court Decision, August 26, 2003 (2002 nu 6127).

70) Supreme Court, Oct. 28, 2004 (2002 du 7456).

71) Supreme Court, May 28, 2002 (2000 du 6121).

fine if factors, which had not been disclosed to the KFTC during the investigation, were later revealed. The Supreme Court subsequently held such power of modification to be invalid for the reason that administrative fines imposed by a government agency must be grounded only in factors confirmed prior to the determination, notwithstanding the subsequent revelation of new factors.[72)]

IV. Conclusion

During the early years of the MRFTA, Korean courts were relatively unfamiliar with the entire field of competition law. With the recent accumulation of cases, however, the courts have gradually enhanced their understanding of the statute.

A key problem is that Courts have usually restricted themselves to deciding the case at hand but have generally not shown a willingness to provide specific rules to be referenced in similar instances. Typically, courts have stated general rules, listed factors that should be considered, and then drawn conclusions with some decisive reasoning. Most such judgments have not been analytical. For example, although courts may list factors to be considered in the course of deciding a case, most judgments have not reviewed each factor in turn or explained what role the various factors had on the ultimate decision. Moreover, although it may be true that most cases handled by the courts have involved hard-core cartels in which the anticompetitive effects were readily apparent, the courts have generally avoided conducting proper economic analysis even in those cases where it would have been appropriate to do so.[73)]

Notwithstanding this overall pattern of reticence, a somewhat different tendency has appeared in some recent decisions under the MRFTA. In such decisions, the Supreme Court has endeavored to articulate specific rules to be applied in similar cases. If this trend continues, such rules may yield significant benefits in the form of more predictable application and enforcement of the MRFTA. Moreover, courts have recently attempted to utilize economic analysis more broadly in their review of cases under the MRFTA. Such efforts could herald an era of unprecedented growth and development of competition law in Korea.

72) *Id*.

73) For example, the music disc case discussed above in Section III.C.4.

Korean Competition Law: First Step towards Globalization

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Abstract

In April 4, 2002, Korea Fair Trade Commission ("KFTC") took the unprecedented step of extraterritorially applying the domestic antitrust law to six foreign manufacturers of graphite electrodes. And on August 26, 2003, the Seoul High Court affirmed KFTC's decision. This is highly significant since it is the first time that a Korean court has acknowledged the extraterritorial application of the domestic competition law. In particular, given the increasing economic interdependence among states in accordance with the globalization trend, the court appears to accept the reality that it can no longer adhere to the conventional bases for jurisdiction, i.e. territorial and nationality principles. Also the subsequent legislative changes that are to take effect on April 1, 2005 are expected to significantly bolster KFTC's capability in the international dimension. Korea has now ushered in the new era of globalization in the international competition arena.

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